No. SC92127

In the Supreme Court of Missouri

CODEY L. SMITH,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

Appeal from Barton County Circuit Court
Twenty-Eighth Judicial Circuit
The Honorable James R. Bickel, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from an order granting Respondent's motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Barton County. The conviction sought to be vacated was for one count each of robbery in the first degree, section 569.020, RSMo;[1] and armed criminal action, section 571.015, RSMo, for which the sentence was sixteen years imprisonment. Following a Missouri Court of Appeals, Southern District opinion reversing the motion court's order, this case was transferred to this Court pursuant to this Court's order upon Respondent's Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Respondent Codey Smith was charged by information with one count each of robbery in the first degree, section 569.020, RSMo; and armed criminal action, section 571.015, RSMo. (L.F. 3, 12).[2] He was tried by a jury on October 15-16, 2008, before Judge James R. Bickel. (Tr. 1-5).

1. Trial and direct appeal proceedings.

On August 30, 2006, two men armed with .22-caliber guns and wearing T-shirts over their heads entered the Fisca Oil Station in Barton County. (Tr. 196-98, 202). One of the men yelled, "Give me all your money now and I'm not kidding." (Tr. 198). The clerk got behind the counter and opened the cash register. (Tr. 199). One of the gunmen fired a shot that struck a cigarette rack. (Tr. 199, 207-08, 215-16). The clerk gave the men all of the money in the cash register – about $700. (Tr. 199-200). The gunmen left the store in a red "dually" truck – a truck that had four tires on the rear end. (Tr. 174, 203). Another clerk got the license plate number off of the truck and gave it to police. (Tr. 212).

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[2] The record on appeal will be cited as: SD29574 Direct Appeal Legal File (L.F.); SD29574 Direct Appeal Transcript (Tr.) SD29574 Sentencing Transcript (Sent. Tr.); SD30971/SC92127 Post-Conviction Legal File (PCR L.F.); SD30971/SC92127 Post-Conviction Transcript (PCR Tr.).

A few months after the robbery, Smith was being held in the Barton County Jail on an unrelated charge. (Tr. 170). He told another inmate that he had gone to a place called Grotheer's Farm and took a red dually truck. (Tr. 174). Smith said that he and a man named Kyle Carroll used the truck to commit the armed robbery of the Fisca Store. (Tr. 174-75). Both men armed themselves with .22-caliber guns. (Tr. 175-76). Smith also said that he was wearing a T-shirt tied around his head and gloves on his hands. (Tr. 176). Smith said that they arrived at the store and asked the clerk to hand over the money, but that the clerk smirked at them like he thought it was a joke. (Tr. 175). Smith then fired a gunshot to let the clerk know that it wasn't a joke. (Tr. 175). Smith told the other inmate that they left with $600 or $700. (Tr. 176). Smith said that he and Carroll went to a strip pit in Kansas known as "the Cliff," and dumped the truck into the pit. (Tr. 177-78).

On January 4, 2007, the inmate in whom Smith had confided told a Barton County deputy about Smith's statements, including the location of where the truck had been dumped. (Tr. 299-31, 256). Weather conditions delayed the recovery effort, but authorities were finally able to retrieve the truck on September 22, 2007. (Tr. 232, 257). An insurance card found inside the truck contained the name Grotheer. (Tr. 238). The license plate on the truck bore the same number observed by the clerk at the Fisca store, and that license plate checked back to Kenneth Grotheer of Grotheer Farms. (Tr.

239-40). Poor visibility prevented the dive teams from searching the bottom of the pit to try to locate any guns. (Tr. 240-41, 258).

Smith did not testify or present any evidence. (Tr. 263-64, 269). The jury found Smith guilty on both counts of the information. (L.F. 41, 42; Tr. 299). Smith waived jury sentencing, and the court imposed concurrent sentences of sixteen years imprisonment for robbery in the first degree and five years imprisonment for armed criminal action. (L.F. 6, 8, 27, 48; Tr. 8; Sent. Tr. 1, 10). When questioned about the representation he received from counsel, Smith said that his only complaint was that counsel failed to get the trial moved to another county. (Sent. Tr. 13-14).

An appeal was taken to the Missouri Court of Appeals, Southern District, which affirmed the conviction and sentence on September 28, 2009. *State v. Smith*, 293 S.W.3d 149 (Mo. App. S.D. 2009). The mandate issued on October 14, 2009. (PCR L.F. 5).

2. Rule 29.15 motion and evidentiary hearing.

On December 28, 2009, Smith filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence, pursuant to Supreme Court Rule 29.15. (PCR L.F. 1, 4-15). Counsel was appointed, and he filed a statement in lieu of an amended motion, pursuant to Supreme Court Rule 29.15(e). (PCR L.F. 1, 16, 21-23). The Rule 29.15 motion alleged, in pertinent part, that trial

counsel William Fleischaker provided ineffective assistance of counsel by failing to call as a witness Kyle Carroll, who would testify that Smith did not act as his accomplice in the robbery. (PCR L.F. 10, 13).

An evidentiary hearing was held on November 2, 2010. (PCR L.F. 3; PCR Tr. 3). Kyle Carroll testified that he was serving a ten-year sentence in the Department of Corrections after pleading guilty to robbery in the first degree for the August 30, 2006 robbery of the Fisca station. (PCR Tr. 17-18). Carroll testified that he had known Smith for about ten years. (PCR Tr. 19). He said that Smith was not involved in the robbery of the Fisca station. (PCR Tr. 19). Carroll said that he had never told anyone who had helped him rob the station, and that, as far as he knew, that person had never been convicted. (PCR Tr. 19-20).

Carroll entered his guilty plea on September 17 2007. (PCR Tr. 21). He said that he learned in early 2008 that Smith had been charged in connection with the robbery. (PCR Tr. 20). Carroll testified that he was never contacted by anyone purporting to represent Smith. (PCR Tr. 21-22). Carroll said that if he had been called to testify at Smith's trial, he would have said that Smith was not with him during the robbery. (PCR Tr. 21).

On cross-examination, Carroll refused to name the person who had been his accomplice in the robbery. (PCR Tr. 23). The court ordered Carroll to answer the question and advised him that he could face criminal contempt

charges for refusing. (PCR Tr. 23-24). Carroll still refused to answer the question. (PCR Tr. 24). He also told the prosecutor that if he had testified at Smith's trial, he would have refused to answer the question had it been put to him. (PCR Tr. 24). Carroll acknowledged that he did not know if the jury would have believed his testimony. (PCR Tr. 24).

Smith testified at the evidentiary hearing that he asked trial counsel William Fleischaker to investigate the possibility of Carroll testifying. (PCR Tr. 28). Smith said that he thought Carroll would give candid and truthful testimony about the robbery, and that Carroll's testimony might help him. (PCR Tr. 28).

The State introduced into evidence a letter received by the prosecuting attorney's office that was dated June 9, 2008, and was signed by Carroll. (PCR Tr. 54-55; PCR L.F. 24). The letter bore the salutation "Dear Attorney" and read:

> I was wondering if I could get a sentence reduction, if I help get another conviction on the Fisca robbery. I was charged with it back in Sept 17, 07 and got 10 years for robbery in the 1st[,] class A felony an (sic) now I'm charged with the vehical (sic) that was stolin (sic) from Crawford Co, KS[.] [A]lso if you look at the evidence, I didn't point my gun at anybody an (sic) didn't fire the shot. I was high on dope, an (sic) know that I done a very wrong

> thing, but nobody can take the blame for what I done. [B]ut I don't think that I should take all the blam (sic). Well if you would please send Pam Miller[3] over to Crawford Co jail I'd like to talk to her. [A]n (sic) maybe we can work out a deal.

(PCR L.F. 24). Carroll denied at the evidentiary hearing that he was offering in the letter to assist the prosecution in obtaining the convictions of anyone else for the robbery. (PCR Tr. 60).

Trial counsel William Fleischaker testified for the State that he had practiced law for thirty-eight years, with about half of his practice involving criminal defense work. (PCR Tr. 35-36). Fleischaker said that he was appointed by the Public Defender System to represent Smith due to a conflict with the local Public Defender's office. (PCR Tr. 36).

Fleischaker testified to his reasons for not calling Kyle Carroll as a witness at Smith's trial:

> Well, here is the problem with Kyle Carroll: Kyle Carroll had written a letter to you offering to assist in the prosecution of Codey. I don't know what, to me it was, it was, when you get a

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[3] Pam Miller was a Barton County Sheriff's Deputy who had interviewed Smith's cellmate and who had been involved in the recovery of the truck used in the robbery. (Tr. 229-40; PCR Tr. 11).

> situation like that, I didn't know what he was going to say. If I took his deposition and he incriminated Codey, then all I've done is put on evidence that makes my client look more guilty to the jury.
>
> So, I didn't[,] I didn't attempt to call Carroll because, basically, I viewed him as kind of a time bomb either way. If he, if he, if he said that he wasn't, Codey wasn't the person with him, then you were going to impeach him and make him look like a liar, you know, using his letter offering to assist you with the prosecution.
>
> So, I mean my feeling was, he was basically, he was just a time bomb. And if I put him on, regardless of what he said, if he – obviously, if he talked backwards and said, yes, I was going to have difficulty impeaching him as my own witness. And if he took the stand and said, and I called him and he said, no, Codey wasn't the person with him, then you were going to have the letter to impeach him with. And either way, I thought calling him was going to be damaging, could do nothing, couldn't help my case and had a whole lot of potential to damage it.

(PCR Tr. 42-43). Fleischaker said that his basic trial strategy was to get the jury to disbelieve Smith's cellmate, who testified to admissions made by

Smith, by convincing the jury that his testimony was bought and paid for by getting a plea deal that involved the dismissal of sex offense charges that he was facing. (PCR Tr. 43-44).

Fleischaker testified on cross-examination that he never had any discussions with Carroll and never made any attempts to contact him. (PCR Tr. 45). Fleischaker said that he was aware that Carroll had pled guilty to the robbery, and had some recollection that Carroll had declined to identify his accomplice. (PCR Tr. 45). When confronted with the question, "So, you didn't know what he (Carroll) would say?," Fleischaker answered:

> As I said, whatever he said, it didn't really matter what he said, because whatever he said was, I felt was just too risky to put him on the stand. The problem is, I could take a tape recorded statement from him or whatever and have it in my possession. I didn't want to have him deposed because, if I depose him and he says that Israel[4] was the one there, then I have preserved that record permanently.

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[4] Israel was the first name of the cellmate who testified against Smith. It appears from the context of the testimony that Fleischaker meant to say Smith and simply misspoke. *See* PCR Tr. 51, where Fleischaker says that he

(PCR Tr. 46). Fleischaker testified that after reading the letter that Carroll sent to the prosecutor, it was his opinion that Carroll was offering to testify against Smith. (PCR Tr. 47). Fleischaker also testified that the prosecutor eventually told him, perhaps after the trial, that he did not call Carroll as a witness because he did not think Carroll's testimony was worth cutting a deal with him. (PCR Tr. 47-48). Fleischaker also said that he was not worried about the State calling Carroll, because he could impeach Carroll with the letter where he was seeking a deal from the State:

> My problem was, if I vouch for him and I put him on, then if, if he says, if he, if he says something that incriminates Codey or if he says Codey wasn't – I mean, if I put him on the stand, he gets on this witness stand and says to the jury, well, Codey wasn't the other guy. Well, who was the other guy? Well, I am not going to tell you who the other guy was. I mean, in my opinion, that burns Codey in front of the jury.

(PCR Tr. 51-52).

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felt it was too big of a risk to put Carroll under oath and have him incriminate Smith.

3. Motion court findings.

At the conclusion of the evidentiary hearing, the motion court stated that it was granting a new trial on Smith's claim that counsel was ineffective for failing to call Carroll as a witness:

> As it related to the failure to contact Kyle Carroll, I believe the trial counsel strategy in deciding not to call Kyle Carroll would be a legitimate trial strategy. Because he, as he testified, no matter what Mr. Carroll may have said, it could have backfired on the movant. However, I have got to feel that, at least Mr. Fleischaker should have talked to Kyle Carroll to see what he may or may not have privately told him that he would testify to. For that reason, I feel that the strategy, trial strategy was based upon speculation as to what he may or may not have felt that Kyle Carroll would say. And if he felt that, no matter what he said, it didn't really make any difference. He couldn't depose him.
>
> I don't know how much he may have, Kyle Carroll may have said. He may have told Mr. Fleischaker who the, that there was another person. He may have named that other person. Mr. Fleischaker, at that point and time, may not have had to rely

only on Kyle Carroll's comments, but he may have been able to develop other evidence to implicate that third party, if in fact there was a third party as opposed to that.

(PCR Tr. 66-67). A written Findings of Fact, Conclusions of Law and Judgment was entered on November 10, 2010. (PCR L.F. 3, 30-37). The judgment stated that trial counsel failed to investigate Carroll's prospective testimony and merely speculated as to what that testimony might be, and found that counsel could not formulate a reasonable strategy without first investigating Carroll as a possible witness. (PCR L.F. 36-37) The court found counsel's failure to investigate prejudiced Smith because there was a reasonable probability of a different outcome had Carroll testified. (PCR L.F. 37). The court ordered that Smith's conviction and sentence be vacated and set aside.[5] (PCR L.F. 37). The State filed a notice of appeal in the circuit court on November 12, 2010. (PCR L.F. 3, 39).

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[5] The court denied relief on seven other claims raised in the Rule 29.15 motion, finding that two of the claims were non-cognizable allegations of trial error and that Smith had failed to present sufficient evidence to establish the five remaining claims. (PCR L.F. 35). Those rulings are not being challenged in this appeal.

POINTS RELIED ON

I.

The motion court clearly erred in vacating Smith's conviction and sentence because the court based its judgment on grounds that were not pled in the Rule 29.15 motion, in that the court's judgment was based on counsel's failure to investigate Kyle Carroll's potential testimony while the Rule 29.15 motion only alleged that counsel was ineffective for failing to call Carroll as a witness and made no allegation that counsel was ineffective for failing to investigate.

Strickland v. Washington, 466 U.S. 668 (1984)

Johnson v. State, 333 S.W.3d 459 (Mo. banc 2011)

State v. Harris, 870 S.W.2d 798 (Mo. banc 1994)

Zink v. State, 278 S.W.3d 170 (Mo. banc 2009)

Supreme Court Rule 29.15

II.

The motion court clearly erred in vacating Smith's conviction and sentence because trial counsel was not ineffective for deciding not to investigate co-defendant Kyle Carroll or call Carroll as a defense witness at trial, and Smith was not prejudiced by counsel's decision, in that counsel made a reasonable strategic decision that Carroll's testimony would be damaging to the defense since Carroll would either implicate Smith in the charged robbery or would be subject to impeachment if he exonerated Smith, and Smith failed to show that the jury would have believed Carroll even if he testified that Smith was not involved in the robbery.

Lowery v. State, 650 S.W.2d 692 (Mo. App. S.D. 1983)

Nickelson v. State, 583 S.W.2d 746 (Mo. App. E.D. 1979)

Rousan v. State, 48 S.W.3d 576 (Mo. banc 2001)

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987)

Supreme Court Rule 29.15

ARGUMENT

I.

The motion court clearly erred in vacating Smith's conviction and sentence because the court based its judgment on grounds that were not pled in the Rule 29.15 motion, in that the court's judgment was based on counsel's failure to investigate Kyle Carroll's potential testimony while the Rule 29.15 motion only alleged that counsel was ineffective for failing to call Carroll as a witness and made no allegation that counsel was ineffective for failing to investigate.

The motion court found that trial counsel was ineffective, and that Smith was prejudiced, because counsel failed to conduct an investigation to determine what Kyle Carroll might have testified to had he been called as a witness at Smith's trial. But that finding was clearly erroneous and should be reversed because it impermissibly goes beyond the claim of ineffective assistance that was pled in the Rule 29.15 motion.

A. Standard of Review.

Review of a Rule 29.15 judgment is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010). Findings

and conclusions are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made. *Id*.

B. Analysis.

The allegations of the Rule 29.15 motion were limited to a claim that trial counsel was ineffective for failing to call Kyle Carroll as a witness. (PCR L.F. 10-11, 13-14). The motion court made verbal findings after the evidentiary hearing that counsel's decision not to call Carroll could be a legitimate trial strategy because, as counsel testified, anything that Carroll said could have backfired. (PCR Tr. 66). But the court went on to find that the strategy was based on speculation because counsel did not talk to Carroll before making the decision not to call him as a witness. (PCR Tr. 66-67). The written findings focused on counsel's failure to investigate, and concluded that counsel could not formulate a reasonable strategy without first investigating Carroll as a possible witness at trial. (PCR L.F. 35-37).

Missouri is a fact pleading state and Rule 29.15 is consistent with that regime. *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994). Pleading defects cannot be remedied by refining the claim or by presenting evidence at a Rule 29.15 hearing. *Id*.; *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. banc 2011). Because the Rule 29.15 motion contained no allegation that counsel was ineffective for failing to investigate, the motion court erred in granting

relief on that theory. The claim that was properly before the court was whether counsel was ineffective in failing to call Carroll as a witness. To obtain relief on that claim, Smith had to overcome the strong presumption that counsel's decision was a matter of sound trial strategy under the circumstances that counsel faced at the time the decision was made. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) *see also Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009) (trial strategy decisions may serve as a basis for ineffective assistance of counsel only if they are unreasonable).

Counsel testified at the evidentiary hearing that he had a strategic reason for not calling Carroll, and the motion court found that counsel's strategy was legitimate. (PCR Tr. 42-43, 66). That finding demonstrates that Smith failed to overcome the presumption of sound trial strategy. Having made that finding, the court should have denied relief on the claim that was actually pled, rather than going beyond the pleadings to grant relief on a theory not contained in the motion.

Smith might argue that the motion court's written findings fall within the scope of the Rule 29.15 motion because those findings discussed the failure to investigate within the context of whether the decision not to call Carroll was a reasonable trial strategy. But even if Smith's interpretation of the written findings is correct, those findings should be considered in conjunction with the verbal findings made at the close of the evidentiary

hearing. The court stated that the decision not to call Carroll "would be a legitimate trial strategy. Because he, as [trial counsel] testified, no matter what Mr. Carroll may have said, it could have backfired on the movant." (PCR Tr. 66). The court then went on to fault counsel for not talking to Carroll beforehand and concluded that even if counsel had not called Carroll as a witness, he might have been able to develop other evidence based on what Carroll told him. (PCR Tr. 66-67).

The motion court thus treated the failure to call Carroll as a witness and the failure to investigate as two separate issues. Only one of those issues was properly before the court, that being the failure to call Carroll as a witness. *See State v. Jacobs*, 861 S.W.2d 621, 626 (Mo. App. W.D. 1993) (issues cannot be tried by consent at a Rule 29.15 hearing, and appellate court will only consider issues raised in an original or amended Rule 29.15 motion).

Because the motion court based its ruling on a theory not included in the Rule 29.15 motion, it clearly erred in finding that Smith was entitled to a new trial due to ineffective assistance of counsel. The judgment granting relief under the Rule 29.15 motion should be reversed.

II.

The motion court clearly erred in vacating Smith's conviction and sentence because trial counsel was not ineffective for deciding not to investigate co-defendant Kyle Carroll or call Carroll as a defense witness at trial, and Smith was not prejudiced by counsel's decision, in that counsel made a reasonable strategic decision that Carroll's testimony would be damaging to the defense since Carroll would either implicate Smith in the charged robbery or would be subject to impeachment if he exonerated Smith, and Smith failed to show that the jury would have believed Carroll even if he testified that Smith was not involved in the robbery.

Smith is not entitled to relief even if this Court determines that the claim raised in the Rule 29.15 motion encompasses counsel's failure to investigate Carroll's possible testimony. Counsel's decision not to investigate Carroll, as well as his decision not to call him as a witness, was a matter of reasonable trial strategy and a function of counsel's professional judgment. Furthermore, Smith failed to demonstrate a reasonable probability that the outcome of his trial would have been different had Carroll testified for the defense.

A. Standard of Review.

Review of a Rule 29.15 judgment is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Moore*, 328 S.W.3d at 702. Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made. *Id*.

To be entitled to post-conviction relief for ineffective assistance of counsel, a Rule 29.15 movant must satisfy a two-prong test. *Zink*, 278 S.W.3d at 175. First, the movant must show that his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would exercise in a similar situation. *Id*. To meet this prong, a Rule 29.15 movant must overcome a strong presumption that counsel's conduct was reasonable and effective. *Id*. at 176. The second prong requires the movant to show that he was prejudiced by trial counsel's failure. *Id*. at 175. To satisfy the prejudice prong, the movant must demonstrate that, absent the claimed errors, there is a reasonable probability that the outcome would have been different. *Id*. at 176. The existence of both the performance and the prejudice prongs must be established by a preponderance of the evidence in order to prove ineffective assistance of counsel. *Id*. at 175.

B. Analysis.

In describing the defense attorney's duty to investigate, the United States Supreme Court has said:

> [C]ounsel has a duty to make *reasonable* investigations or to make a *reasonable* decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for *reasonableness* in all the circumstances, applying a heavy measure of deference to counsel's judgment.

Strickland, 466 U.S. at 691 (emphasis added). Investigations need only be adequate under the circumstances. *Sanders v. State*, 738 S.W.2d 856, 858 (Mo. banc 1987). In particular, the reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant. *Id*. The selection of witnesses and the introduction of evidence are questions of trial strategy, and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel. *Id*. Only rarely does a court find that the failure to interview witnesses is sufficient to justify the finding of ineffective assistance of counsel. *Id*.

1. Counsel made a reasonable decision that an investigation of Carroll was unnecessary.

This case presents one of those circumstances where counsel's decision not to interview a witness is a matter of trial strategy and within counsel's professional judgment. Smith argued in the Court of Appeals and in his Application for Transfer that counsel could not make a reasonable strategic decision about calling Carroll as a witness without first talking to Carroll to find out what he would have testified to. But that argument overlooks counsel Fleischaker's testimony at the Rule 29.15 hearing that Carroll was subject to impeachment no matter what he said. (PCR Tr. 42-43). It was for that reason that Fleischaker testified that he viewed Carroll "as kind of a time bomb." (PCR Tr. 42). Fleischaker knew that Carroll had written a letter to the prosecutor that appeared to be an offer to assist in Smith's prosecution. (PCR L.F. 42). Fleischaker realized that he would be unable to effectively impeach Carroll if he took the stand and implicated Smith, and also that the prosecution would impeach Carroll with the letter if he exonerated Smith. (PCR Tr. 42-43). Fleischaker's testimony made clear that even if he talked to Carroll before trial, and even if Carroll said that he would exonerate Smith of any involvement in the robbery, that testimony would still be of little value in light of the letter that Carroll wrote to the prosecutor. (PCR Tr. 42; PCR L.F. 24). As counsel noted, Carroll could essentially testify

to one of two things – that Smith was his accomplice in the robbery or that he was not. (PCR Tr. 42-43). Fleischaker viewed Carroll's testimony as damaging no matter which way it went. An attorney will not be found ineffective for not pursuing a particular investigation that might turn out to be harmful to his case. *Martin v. State*, 712 S.W.2d 14, 17 (Mo. App. E.D. 1986). Fleischaker's testimony at the Rule 29.15 hearing established that talking to Carroll before trial would not have changed the decision to not call Carroll as a witness. (PCR Tr. 42-43).

In a case with some parallels to the present one, the Southern District of the Court of Appeals rejected a claim of ineffective assistance lodged against Fleischaker for failure to call a co-defendant in a robbery case, despite Fleischaker's admission that he did not know prior to trial what the witness was going to say. *Lowery v. State*, 650 S.W.2d 692, 694 (Mo. App. S.D. 1983). Fleischaker had testified to his concern that the co-defendant would either invoke the Fifth Amendment or would testify that his client was involved in the charged robbery. *Id*. The Southern District found that Fleischaker "acted prudently" in not calling the co-defendant under the circumstances then before him. *Id*.

Similarly, this Court and the Eastern District of the Court of Appeals have rejected failure to investigate claims when the decision to forego investigation was matter of trial strategy and a function of counsel's

professional judgment. *Sanders*, 738 S.W.2d at 860; *Sweazea v. State*, 588 S.W.2d 244, 246 (Mo. App. E.D. 1979); *Nickelson v. State*, 583 S.W.2d 746, 747 (Mo. App. E.D. 1979).

The claim rejected by this Court in *Sanders* was that counsel was ineffective for failing to adequately investigate a woman who was charged along with the defendant in the armed robbery of a jewelry store. *Sanders*, 738 S.W.2d at 857. The Court found that counsel's decision to not extensively question the co-defendant in a formal interview "was based on an unconfirmed belief that [the co-defendant] either would not provide testimony helpful to [the movant] or would not be permitted by her lawyer to testify." *Id*. at 860. The Court concluded that counsel's belief "was reasonable under the circumstances and was not clearly beyond the bounds of prevailing professional norms." *Id*.

Nickelson also involved a claim that counsel was ineffective for failing to interview the co-defendant. *Nickelson*, 583 S.W.2d at 747. As in this case, the decision not to interview the co-defendant was based on concerns that the co-defendant's testimony might not be favorable. *Id*. The Eastern District concluded that counsel's decision not to interview the co-defendant and utilize his testimony was a matter of trial strategy and an exercise of counsel's professional experience. *Id*. Accordingly, no grounds were found to exist for finding ineffective assistance of counsel. *Id*. at 748. The court in

Sweazea also rejected on the basis of trial strategy a claim that counsel was ineffective for failing to interview two purported alibi witnesses. *Sweazea*, 588 S.W.2d at 246.

Smith's proposed standard that attorneys should always interview prospective witnesses before deciding whether to call them at trial conflicts with the precedent noted above. It flies in the face of the *Strickland* standard that permits counsel to make a reasonable decision that investigation of a potential witness is unnecessary. It also replaces the *Strickland* and *Sanders* standard of assessing counsel's decisions in the context of the circumstances of the case with a *per se* rule that failure to interview amounts to ineffectiveness. But the Supreme Court has rejected the imposition of rigid rules governing counsel's conduct as "interfer[ing] with the constitutionally protected independence of counsel and restrict[ing] the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. Smith's proposed requirement also overlooks the fact that counsel's strategic decisions are made in "the real world containing real limitations of time and human resources." *State v. Twenter*, 818 S.W.2d 628 (Mo. banc 1991). It is for that reason that counsel is given heavy deference in deciding what witnesses are worthy of pursuit. *Id*. Smith's proposed standard erases that deference. It would also force attorneys to expend time and resources on conducting investigations that they reasonably believe will be fruitless. Such

a requirement would inevitably divert time and resources from more fruitful pursuits, which raises the spectre of counsel being found ineffective for not adequately developing viable defense strategies.

This case presents a prime example of why such a requirement is unnecessary. As noted above, Carroll could testify to one of two things, and counsel reasonably determined that his testimony would be damaging no matter which way it went. Since the motion court found at the hearing that not calling Carroll could be a reasonable trial strategy, it defies logic to declare counsel ineffective for failing to take the meaningless step of talking to Carroll.

An order granting a new trial based on a failure to interview carries other ramifications worth considering. One is that counsel could interview Carroll and stick to his original decision that Carroll should not be called as a witness. In that case, Appellant gets the windfall of a second trial where the evidence will be the same as the first. Another possibility is that counsel will feel compelled by the granting of the Rule 29.15 motion to call Carroll as a witness, even though he believes it is the wrong strategic move. A ruling that coerces counsel into taking a course that he deems unwise is precisely the situation that the Supreme Court warned against in *Strickland*:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced

> by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. This Court has also recognized that defense counsel must be given broad leeway in determining what strategy to follow, and the rule that Smith proposes threatens to unduly interfere with counsel's discretion. *State v. Basile*, 942 S.W.2d 342, 355 (Mo. banc 1997).

2. Not calling Carroll to testify was a reasonable strategic decision.

Turning to the claim contained in the Rule 29.15 motion, that Fleischaker was ineffective for failing to call Carroll as a witness, that decision was part of a reasonable trial strategy. One of counsel's concerns was that Carroll's testimony would prove damaging to the defense. (PCR Tr. 42, 43). Not calling a witness who could provide damaging testimony is clearly a reasonable trial strategy. *Rousan v. State*, 48 S.W.3d 576, 587 (Mo. banc 2001); *Maclin v. State*, 184 S.W.3d 103, 110 (Mo. App. S.D. 2006); *State v. Allen*, 829 S.W.2d 524, 529 (Mo. App. W.D. 1992). And if Carroll did attempt to exonerate Smith, the State could have impeached him with the letter to the prosecutor, which is reasonably read as Carroll seeking a deal in exchange for assisting in the prosecution of his accomplice in the robbery.

(PCR Tr. 42-43). Failing to call a witness who is vulnerable to impeachment is also a reasonable trial strategy that does not give rise to a finding of ineffective assistance of counsel. *Rousan*, 48 S.W.3d at 587; *Roberts v. State*, 772 S.W.2d 376, 380 (Mo. App. S.D. 1989).

Finally, Smith failed to demonstrate that the outcome of the trial would have been different had Carroll been called to testify. Even if Carroll did testify at trial that Smith was not involved in the robbery, there is no assurance that the jury would have believed him. Rather, it most likely would have viewed Carroll's testimony with suspicion. Because Carroll had already been sentenced for his role in the robbery, the jury could well have believed that he had nothing to lose by lying to help his accomplice. And had the State impeached Carroll with his letter to the prosecutor and learned that the State had not offered him a deal, the jury might have found that Carroll's testimony was motivated by a desire to get back at the prosecutor for not helping him. The jury would also have had to wholly disbelieve the testimony of Smith's cellmate, who relayed statements made by Smith about details that would only be known by someone involved in the robbery, including the location of the truck, which was submerged in a pit. (Tr. 177-78, 299-31). The jury's verdict demonstrated that it found the cellmate credible, despite the defense efforts to discredit his testimony, and there is no

reason to think that Carroll's testimony would have altered that credibility determination.

The motion court clearly erred in finding that Smith's conviction and sentence should be vacated for ineffective assistance of trial counsel. The judgment granting relief under the Rule 29.15 motion should be reversed.

CONCLUSION

In view of the foregoing, Appellant submits that the judgment of the motion court should be reversed and that Respondent's motion for post-conviction relief under Rule 29.15 should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,306 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 21st day of February, 2012, to:

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